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Procedure in Treason Cases

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PROCEDURE IN TREASON CASES

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Introduction.—Article III, section 3 of the Constitution provides: "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[1]

The constitutional requirement of two witnesses "applies as well to the legislative as to the judicial department of the government, and an act of Congress, therefore, in conflict with it would be a nullity."[2]

The constitutional safeguards applied to treason are not applicable to a violation of the Espionage Act,[3] which prohibits communication of restricted information where the defendant intends or has reason to believe that it will be of advantage to any foreign nation regardless of whether such nation is friend or enemy.[4]

Perjury compared. — Treason differs from perjury in that two witnesses are always required to prove the overt act in treason. In perjury there is what is known as the "documents exception" to the rule requiring two witnesses, under which exception one witness and corroborating evidence is sufficient.[5]

Accomplice testimony compared.—The fact that the testimony of one witness alone is not enough to establish treason and

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1. For the history of the adoption of this provision see United States v. Robinson, 259 F. 685, 692-93 (S.D.N.Y. 1919). *See also* 18 U.S.C. § 2381 (1964) (statutory definition of treason).

2. Charge to the Grand Jury—Treason, 30 F. Cas. 1036 (No. 18,272) (C.C.S.D. Ohio 1861).

3. 18 U.S.C. §§ 793-94 (1964).

4. United States v. Rosenberg, 195 F.2d 583, 609 (2d Cir.), *cert. denied,* 344 U.S. 889 (1952), *stay of execution denied,* 346 U.S. 322 (1953). *See also* United States v. Drummond, 354 F.2d 132, 152 (2d Cir. 1965).

5. United States v. Wood, 39 U.S. (14 Pet.) 430, 441 (1840); Barker v. United States, 198 F.2d 932 (9th Cir. 1952); *accord,* Radomsky v. United States, 180 F.2d 932 (9th Cir. 1950); *see* 4 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 459-64 (1967).

perjury does not necessarily argue for a similar rule as to accomplices. As a court has stated: "The exception in treason or perjury should not obtain in the trial of the ordinary criminal case. In the case of treason the provision is embedded in the Constitution. In the case of perjury the rule is 'deeply rooted in past centuries.' "[6]

The two witnesses rule—procedure before trial.—An early case possibly held that the constitutional requirement that there be two witnesses to the overt act of treason applied to the preliminary examination.[7] But this view was not followed in subsequent cases.[8] Nor were two witnesses required at the grand jury proceeding.[9]

The two witnesses rule—trial.—In a case arising out of the Whisky Insurrection of 1794 in western Pennsylvania, it was held that where the testimony of several witnesses demonstrated that the defendant was present and took part in a treasonable conspiracy, proof by two or more witnesses that he marched as a volunteer with arms and in military array, with a party who actually used force to prevent the execution of an act of Congress, was sufficient without proof by two witnesses that he was actually present when the acts of violence were committed.[10] Under English authority the very act of marching was considered as carrying the traitorous intention into effect.[11]

In 1827 Justice Story, speaking for the Supreme Court, stated: "The case of treason stands upon a peculiar ground; there the *overt* acts must, by statute, be specially laid in the indictment, and must be proved as laid. The very act, and

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6. Audett v. United States, 265 F.2d 837, 847-48 (9th Cir. 1959); *see* 4 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 510 (1967).

7. Case of Fries, 9 F. Cas. 826, 914 (No. 5,126) (C.C.D. Pa. 1799).

8. Charge to the Grand Jury—Treason, 30 F. Cas. 1047, 1049 (No. 18,276) (C.C.E.D. Pa. 1851); United States v. Burr, 25 F. Cas. 2 (No. 14,692a) (C.C.D. Va. 1807) (*semble*); United States v. Greiner, 26 F. Cas. 36, 40 (No. 15,262) (E.D. Pa. 1861).

9. Charge to the Grand Jury—Treason, 30 F. Cas. 1047, 1049 (No. 18,276) (C.C.E.D. Pa. 1851).

10. United States v. Mitchell, 26 F. Cas. 1277, 1281 (No. 15,788) (C.C.D. Pa. 1795). For a discussion of this case see United States v. Robinson, 259 F. 685, 693 (S.D.N.Y. 1919). *See generally* 7 J. WIGMORE, EVIDENCE §§ 2036-39 (3d ed. 1940).

11. M. FOSTER, CROWN LAW 218 (3d ed 1792).

mode of the act, must, therefore, be laid as it is intended to be proved."[12]

In 1919 Judge Learned Hand stated: "[I]t is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits together of the overt act, but, if so, each bit must have the support of two oaths; on that, I say nothing."[13] Conviction cannot be had on the testimony of one witness together with circumstantial evidence although it is well-nigh conclusive. Furthermore, the jury must believe both witnesses.[14] Direct proof, and not circumstantial proof is required.[15]

Justice Jackson, speaking for the Supreme Court, stated:

> And while two witnesses must testify to the same act, it is not required that their testimony be identical. Most overt acts are not single, separable acts, but are combinations of acts or courses of conduct made up of several elements . . . . One witness might hear a report, see a smoking gun in the hand of defendant and see the victim fall. Another might be deaf, but see the defendant raise and point the gun, and see a puff of smoke from it. The testimony of both would certainly be "to the same overt act," although to different aspects.[16]

In a treason prosecution during the Second World War, it was held that the government had to prove by no fewer than two witnesses at least one of the overt acts alleged in the indictment.[17] It was held immaterial that the overt acts were committed outside the United States. In another case the court of appeals reversed because none of the overt acts was proved by two witnesses.[18] The requirement of two witnesses to the same overt act is the result of a long history in which

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12. United States v. Gooding, 25 U.S. (12 Wheat.) 460, 475 (1827) (emphasis added), *quoted with approval in* United States v. Haupt, 136 F.2d 661, 675 (7th Cir. 1943).

13. United States v. Robinson, 259 F. 685, 694 (S.D.N.Y. 1919) (emphasis added); *see* 7 J. WIGMORE, EVIDENCE § 2038, at 237 (3d ed. 1940).

14. United States v. Robinson, 259 F. 685, 692 (S.D.N.Y. 1919).

15. *Id.* at 691. *See also* United States v. Burr, 25 F. Cas. 55, 176 (No. 14,693) (C.C.D. Va. 1807).

16. Haupt v. United States, 330 U.S. 631, 640 (1947); *accord,* Kawakita v. United States, 343 U.S. 717, 742 (1952) (variance of testimony as to details not fatal).

17. Stephan v. United States, 133 F.2d 87, 92 (6th Cir.), *cert. denied,* 318 U.S. 781, *direct appeal denied per curiam,* 319 U.S. 423 (1943). *See also* 30 VA. L. REV. 183 (1943).

18. United States v. Haupt, 136 F.2d 661, 665, 674 (7th Cir. 1943).

an effort was made to make treason consist of compassing.[19] The prosecution of Aaron Burr failed because there was no proof of an overt act by two witnesses.[20] It is not necessary, however, to prove all the overt acts alleged; it is enough to prove one, and the others may be treated as surplusage.[21]

The Constitution requires that the overt acts be established by direct evidence of two witnesses instead of one.[22] The overt acts must be intentional. Adherence to the enemy, in the sense of a disloyal state of mind need not be proved by two witnesses. Reasonable inferences may be drawn from the overt acts. The government must prove that the defendant acted with intention and purpose to betray. But in some cases the overt act itself would be evidence of treasonable purpose and intent. The constitutional protection of the two witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given to the enemy. The overt act must show sufficient action by the defendant to sustain a finding that the defendant actually gave aid and comfort to the enemy. The government cannot rely on evidence not meeting the constitutional test for overt acts to create any inference that the defendant did other acts or did something more than was shown in the overt acts, in order to make out a giving of aid and comfort to the enemy. Admissions made out of court, if otherwise admissible, cannot supply a deficiency in proof of the overt act itself.

Testimony of two or more witnesses that the defendant met German saboteurs on specific occasions and at places charged, and that they drank together and engaged in long and earnest conversation failed to establish overt acts.[23] The four dissenting Justices concluded that the meetings with the saboteurs might have been adequate overt acts and that any possible doubt as to the significance of these meetings had been cured by other evidence together with the defendant's own admissions in court.

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19. The history is traced in United States v. Robinson, 259 F. 685 (S.D.N.Y. 1919). *See also* 7 J. WIGMORE, EVIDENCE § 2038 (3d ed. 1940).

20. United States v. Burr, 25 F. Cas. 55 (No. 14,693) (C.C.D. Va. 1807).

21. Stephan v. United States, 133 F.2d 87, 92 (6th Cir.), *cert. denied,* 318 U.S. 781, *direct appeal denied per curiam,* 319 U.S. 423 (1943).

22. *See* Cramer v. United States, 325 U.S. 1, 45 (1945) where the Court stated that "Congress . . . [cannot] dispense with the two-witness rule merely by giving . . . [treason] another name." *Accord,* United States v. Drummond, 354 F.2d 132, 152 (2d Cir. 1965); *see* Hurst, *Treason in the United States* (pts. 1-3), 58 HARV L. REV. 226, 395, 806 (1944-1945).

23. Cramer v. United States, 325 U.S. 1 (1945).

Perhaps the dissenters said in effect that all that need be proved by two witnesses is an overt act which will link the defendant with the enemy, provided that other evidence shows that such act was part of a treasonable project and was done in furtherance of it. Justice Douglas objected strongly to the statement of the majority that the protection of the two witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given; and that every act, movement, deed, and word of the defendant must be supported by the testimony of two witnesses. He asserted that there was no historical basis for such statements. Professor Hurst has concluded: "Certainly there is no sound basis in English or American history to require that the overt act be such as to evidence the intent."[25] Thus it might be said that prosecutions for treason are discouraged.[26]

In 1947 the Supreme Court held, with Justice Murphy dissenting, that proof by direct testimony of two witnesses that the defendant gave shelter for a period of six days to an enemy agent who had entered the United States for purposes of sabotage, helped him buy an automobile and helped him obtain employment in a plant manufacturing military equipment, all in aid of his known purpose of sabotage, was sufficient proof of overt acts. It made no difference that the defendant and the saboteur were father and son.[27] The Supreme Court, speaking through Justice Douglas, stated:

> Two witnesses are required not to the disloyal and treacherous intention but to the same overt act.[28]
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> . . . .
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> Petitioner challenges the sufficiency of the evidence to show the second element in the crime of treason—adhering to the enemy. The two witness requirement does not extend to this element.[29]

24. *Id.* at 48.

25. Hurst, *Treason in the United States,* 58 HARV. L. REV. 806, 845 (1945).

26. *But see* note, 19 TEMP. L.Q. 306, 314 (1945); United States v. Haupt, 152 F.2d 771, 787 (7th Cir. 1945) (dissenting opinion).

27. Haupt v. United States, 330 U.S. 631 (1947). Other convictions for treason were affirmed in Kawakita v. United States, 343 U.S. 717 (1952); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951); Burgman v. United States, 188 F.2d 637 (D.C. Cir. 1951); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950). *See also* United States v. Monti, 100 F. Supp. 209 (E.D.N.Y. 1951) (plea of guilty upheld).

28. Kawakita v. United States, 343 U.S. 717, 736 (1952).

29. *Id.* at 742.

When a legal basis has been laid for a conviction of treason by the testimony of two witnesses to the same overt act, there is nothing in the Constitution precluding the use of corroborative out-of-court admissions or confessions,[30] so long as properly obtained.

The two witnesses rule—plea of guilty.—If the defendant pleads guilty the government need not prove the overt acts by two witnesses. A court has stated that "a plea of guilty admits all facts averred in the Government's pleading."[31] But a mere confession by the defendant that he committed the overt acts charged is not sufficient.[32]

Intent.—Proof by two witnesses of criminal intent is not required.[33] Criminal intent may be proved by one or more witnesses or by circumstances or by a single fact. The two witness requirement does not extend to the "second element in the crime of treason—adhering to the enemy."[34]

Conversations and occurrences showing the defendant's sympathy with Germany and hostility to the United States were held admissible on the question of intent and adherence to the enemy.[35]

Order of Proof.—The declaration of the defendant of his intention to commit any of the overt acts charged in the indictment may be given in evidence before evidence is offered of such overt acts. But his confession of having committed the overt act charged cannot be given in evidence.[36]

Presumption of coercion of wife.—The presumption that criminal acts of the wife in the presence of her husband were done at his coercion has not been applied to treason.[37] In 1960 the

30. Haupt v. United States, 330 U.S. 631, 643 (1947); *cf.* Respublica v. M'Carty, 2 Dall. 86 (Pa. 1781); Case of Fries, 9 F. Cas. 826, 914 (No. 5,126) (C.C.D. Pa. 1799).

31. *E.g.*, United States v. Monti, 168 F. Supp. 671 (E.D.N.Y. 1958); *see* 2 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, 113-17 (1966).

32. *Cf.* United States v. Lee, 26 F. Cas. 907 (No. 15,584) (C.C.D.C. 1814).

33. Stephan v. United States, 133 F.2d 87, 94 (6th Cir.), *cert. denied,* 318 U.S. 781, *direct appeal denied per curiam,* 319 U.S. 423 (1943); *see* Case of Fries, 9 F. Cas. 924, 931 (No. 5,127) (C.C.D. Pa. 1800).

34. Kawakita v. United States, 343 U.S. 717, 742 (1952).

35. Haupt v. United States, 330 U.S. 631, 642 (1947).

36. United States v. Lee, 26 F. Cas. 907 (No. 15,584) (C.C.D.C. 1814).

37. *See* 3 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 410 (1966); *cf.* Kivette v. United States, 230 F.2d 749, 755 (5th Cir. 1956), *cert. denied,* 335 U.S. 935 (1958); Ansley v. United States, 135 F.2d 207, 208 (5th Cir. 1943).

Supreme Court seemed to deny the existence of any presumption in criminal cases in general.[38] But in one case the trial court sentenced the husbands to death and the wives to imprisonment and fines because of different degrees of guilt resulting from the leadership of the husbands.[39]

Sound recordings.—In a prosecution for treason in which it was alleged that the defendant had made disc recordings for radio broadcast in Germany, it was held that the recordings could be introduced in evidence.[40]

Competency of witness.—An enemy army officer may testify in a treason trial. Objection goes to credibility of testimony, and not to competency.[41]

Evidence of other offenses.—In a prosecution for treason it was held prejudicial to prove that the defendant in the course of the treasonable acts joined with others in robbing the mails, when there was already an indictment against him for the latter offense and there was no evidence that the mail was intercepted and rifled with a treasonable intent.[42]

When the overt act of treason has been proved by two witnesses, it is proper to introduce evidence to show the course of the defendant's conduct at other places, and the purpose with which he went to the place where the treason occurred; and if he went with a treasonable design, then the proof of treason is complete.[43] District Judge Peters, in his instructions to the jury, stated:

> [E]vidence may be given of other circumstances, or even of other acts, connected with that on which the indictment is grounded, and occurring or committed in any other part of the district than the one mentioned . . . to show the quo animo—the intent—with which the act laid was committed.[44]

38. United States v. Dege, 364 U.S. 51, 53 (1960).

39. United States v. Haupt, 47 F. Supp. 836, 842 (N.D. Ill. 1942), *rev'd on other grounds*, 136 F.2d 661 (7th Cir. 1943).

40. *See* 4 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 242 (1967); Burgman v. United States, 188 F.2d 637, 639 (D.C. Cir. 1951).

41. Stephan v. United States, 133 F.2d 87, 95 (6th Cir.), *cert. denied*, 318 U.S. 781, *direct appeal denied per curiam*, 319 U.S. 423 (1943).

42. United States v. Mitchell, 26 F. Cas. 1282 (No. 15,789) (C.C.D. Pa. 1795); *cf.* 2 J. WIGMORE, EVIDENCE § 369 (3d ed. 1940); *see* 3. L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, 852-53 (1966).

43. Case of Fries, 9 F. Cas. 826, 914 (No. 5,126) (C.C.D. Pa. 1799) (such an instruction to jury given by Iredell, J.).

44. *Id.* at 909.

Chief Justice Marshall held in the trial of Aaron Burr that acts of treason elsewhere than charged were admissible since they "by showing a general evil intention, render it more probable that the intention in the particular case was evil."[45]

The Criminal Code of Canada provides as to treason that "no evidence is admissible of an overt act unless that overt act is set out in the indictment or unless the evidence is otherwise relevant as tending to prove an overt act that is set out therein."[46]

Self-serving declaration.—Wigmore has pointed out that statements of political opinion should be admitted in favor of the defendant in trials for treason and sedition.[47] They had long been so admitted in England. But on a prosecution for attempting to cause insubordination in the military forces in the United States, the defendant's offer to show utterances at a prior time "in favor of war with Germany" were held irrelevant.[48]

Indictment.—The fifth amendment confers the right to indictment by a grand jury in capital or otherwise infamous cases. Thus treason is included. The right cannot be waived. Rule 7(a) of the Federal Rules of Criminal Procedure provides: "An offense which may be punished by death shall be prosecuted by indictment."[49] Where the indictment charges only one offense, but numerous overt acts, several defendants may be joined though all of them did not participate in each overt act.[50]

A federal statute provides: "A person charged with treason or other capital offense shall at least three days before commencement of trial be furnished with a copy of the indictment . . . ."[51] Rule 10 of the Federal Rules of Criminal Procedure provides that every federal defendant "shall be given a copy of the indictment or information before he is called upon to

45. United States v. Burr, 25 F. Cas. 52, 54 (No. 14,692h) (C.C.D. Va. 1807).

46. CAN. REV. STAT. c. 51, § 55 (1954).

47. 6 J. WIGMORE, EVIDENCE § 1732 (3d ed. 1940); *see* 4 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 399-400 (1967).

48. United States v. Krafft, 249 F. 919 (3d Cir. 1918).

49. *See* Smith v. United States, 360 U.S. 1, 6 (1959); 1 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 570-75, 657-58 (1966).

50. United States v. Haupt, 136 F.2d 661, 665 (7th Cir. 1943); *see* 1 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 786 (1966).

51. 18 U.S.C. § 3432 (1964); *see* 2 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 17-18 (1966).

plead." The defendant may waive his right to a copy.[52] He waives by failure to object before the end of trial.[53]

List of jurors.—A federal statute provides that one charged with treason shall be furnished with "a list of the veniremen," that is to say, a list of the jurors. The list is to be furnished "at least three entire days before commencement of trial." The place of abode of the juror is to be stated.[54]

List of witnesses.—A federal statute provides: "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with . . . a list . . . of witnesses to be produced on the trial for proving the indictment, stating the place of abode of each . . . witness."[55]

Right to counsel.—Under a statute of 1790 any person indicted for treason shall "be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are herby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all reasonable hours . . . ."[56] It was only as late as 1938 that the Supreme Court held that there is a right to assigned counsel in all criminal cases in which the defendant is indigent.[57]

Bail.—In 1795 a court stated that "[t]he circumstances must be very strong, which will, at any time, induce us to admit a person to bail, who stands charged with high treason."[58] But the same year another court allowed bail.[59]

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52. Logan v. United States, 144 U.S. 263, 304 (1892).

53. Aldridge v. United States, 47 F.2d 407, 409 (D.C. Cir. 1931), *rev'd on other grounds,* 283 U.S. 308 (1931).

54. 18 U.S.C. § 3432 (1964); *see* L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 277-78 (1947). *See also* L. ORFIELD, LIST OF JURORS AND WITNESSES IN FEDERAL CRIMINAL CASES (to be published in Federal Rules Decisions).

55. 18 U.S.C. § 3432 (1964); *see* 6 J. WIGMORE, EVIDENCE §§ 1850-55 (3d ed. 1940).

56. Act of April 30, 1790, ch. 9, § 29, 1 Stat. 112; *see* 6 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 61 (1967).

57. Johnson v. Zerbst, 304 U.S. 458 (1938).

58. United States v. Stewart, 27 F. Cas. 1338 (No. 16,401) (C.C.D. Pa. 1795); *see* 6 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 182-83 (1967).

59. United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795) (bail in sum of $4,000 and two sureties each in sum of $2,000). *See also* Case of Davis, 7 F. Cas. 63, 78 (No. 3,621a) (C.C.D. Va. 1867-71).

Whether a defendant charged with treason shall be admitted to bail is within the court's discretion in a habeas corpus proceeding. The court must give due weight to the evidence and to the nature and circumstances of the offense. Where the defendant had been held for five months without trial, but the government contended that extensive preparation was necessary and that if an indictment was found, the government would be then ready for trial, bail was denied but without prejudice to a further application. "But there must come a time when very long incarceration on a mere complaint deprives a prisoner of a constitutional right."[60]

Jury.—The fact that government employees sat on the trial jury does not render the trial a partial one.[61] Failure to sequester the jury during trial is not necessarily prejudicial error.[62]

60. *Ex parte* Monti, 79 F. Supp. 651, 654 (E.D.N.Y. 1948).

61. Burgman v. United States, 188 F.2d 637 (D.C. Cir.), *cert. denied,* 342 U.S. 838 (1951); *see* 3 L. Orfield, Criminal Procedure Under the Federal Rules 136, 187 (1966).

62. Stephan v. United States, 133 F.2d 87, 99 (6th Cir.), *cert. denied,* 318 U.S. 781, *direct appeal denied per curiam,* 319 U.S. 423 (1943); *see* 3 L. Orfield, Criminal Procedure Under the Federal Rules 449-54 (1966).